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RE LIM CHAN KWANG, EX P PUBLIC BANK BHD

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH J
[BANKRUPTCY PROCEEDINGS NO: 29-393-2005-III]
B 4 MAY 2007

BANKRUPTCY: *Notice - Setting aside - Default judgment - Whether a final judgment - Whether judgment given on merits - Whether SAR erred*

C On 29 July 2002, the creditor (bank) obtained judgment in default of appearance (judgment) of an application for summary judgment which was served on the debtor (judgment debtor) by way of substituted service. On 10 September 2003, the judgment debtor filed in an application to set aside the judgment in default and on D 22 July 2004 the deputy registrar set aside the same. The bank appealed against the deputy registrar's decision to the judge in chambers and on 18 January 2005 the judge allowed the appeal and held that the judgment debtor had not raised any triable issues and reinstated the 29 July 2002 *ex parte* judgment against E the judgment debtor. The judgment debtor had lodged an appeal against the decision of the judge to the court of appeal which is still pending. The bank based on the decision of the judge issued a bankruptcy notice (BN) and then served it on the judgment debtor. The judgment debtor took out an application to set aside F the BN. This application was dismissed by the senior assistant registrar (SAR), hence this appeal by the judgment debtor against the dismissal. The issue that arose was whether or not the judgment dated 29 July 2002 was a final judgment.

G **Held (dismissing the appeal):**

(1) The *ex parte* judgment given in an application for summary judgment became a judgment given on merits after the judge in chambers allowed the appeal against the deputy registrar's decision and ordered judgment to be entered against the H debtor. The judgment was a final judgment. Accordingly, the answer to the above issue for determination was in the affirmative. The SAR had not erred in arriving at the aforesaid decision. (paras 10, 15 & 16)

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Case(s) referred to:
Re Lo Kon Wah, ex p Jupiter Securities Sdn Bhd [2000] 5 MLJ 180 ***(refd)***
Re Sashidaran KV Nair, ex p Alliance Bank Malaysia Bhd [2006] 4 CLJ 348 HC ***(refd)***
Re Tan Ah Poi, ex p Multi-Purpose Finance Bhd [1999] 2 CLJ 694 HC ***(refd)***
Re Udos Riging, ex p Seabanc Kredit Sdn Bhd [1994] 3 MLJ 383 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Subordinate Courts Rules 1980, O. 28 r. 6(1)(a)

For the judgment debtor - Ernest Chua; M/s Ernest Chua & Co
For the judgment creditor - Jamie Tai; M/s Tang & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah J:

Background

[1] On 29 July 2002, the creditor (the bank) obtained judgment in default of appearance (judgment) of an application for summary judgment which was served on the debtor (judgment debtor) by way of substituted service. On 10 September 2003, the judgment debtor filed in an application to set aside the judgment in default and on 22 July 2004 the learned deputy registrar set aside the same. The bank appealed against the learned deputy registrar's decision to the judge in chambers and on 18 January 2005 the learned judge allowed the appeal and held that the judgment debtor had not raised any triable issues and reinstated 29 July 2002 *ex parte* judgment against the judgment debtor. In short there was no defense to the bank's claim. This judgment is attached as exh. E in encl. 76. The judgment debtor had lodged an appeal against the decision of the learned judge to the Court of Appeal and the appeal is still pending. The bank based on the decision of the learned judge issued a bankruptcy notice dated 22 November 2005 (BN) and then served it on the judgment debtor on 16 March 2006. The judgment debtor took out an application to set aside the BN dated 23 March 2006 (encl. 16). This application was dismissed by the learned senior assistant registrar (SAR) on 26 September 2006, hence this appeal by the judgment debtor against the dismissal.

[2] An appeal of this nature in law is a rehearing; hence this court is not hampered by whatever happened before the SAR.

Issue

[3] As agreed by counsels, there is only one issue and that is whether or not the judgment dated 29 July 2002 is a final judgment. This concerns the interpretation of s. 3(1)(i) of the Bankruptcy Act which states as follows:

> **3 Act of bankruptcy**
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> (1) A debtor commits an act of bankruptcy in each of the following cases:
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> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has been served on him in the Federation ... a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order ...; and he does not within seven days after service of the notice ... comply with the requirements of the notice ...

[4] Provided that for the purposes of this paragraph ... any person who is entitled to enforce a **final judgment** or final order shall be deemed to be a creditor who has obtained a **final judgment** or final order. (emphasis added)

Counsels' Contentions

[5] Mr Ernest Chua, counsel for the judgment debtor, submitted that the judgment is not final judgment and relied heavily on the case of *Re Udos ak Riging, ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383 *(Re Udos)*. The facts were these. The petitioner there obtained judgment in default pursuant to O. 28 r. 6(1)(a) of the Subordinate Courts Rules 1980 against the debtor and another person. The debtor applied to set aside the judgment. While waiting the hearing of the application, the petitioner served a bankruptcy notice on the debtor. The debtor filed an affidavit in the High Court under the bankruptcy rules to set aside the bankruptcy notice on the ground that the application to set aside the judgment had not been heard. The magistrate dismissed the application to set aside the judgment whereupon the debtor appealed to the High Court. The issue before the court was

whether the judgment in default is a final judgment whilst there was an appeal pending before the judge against the Magistrate's decision. Abdul Kadir Sulaiman J (as he then was) held:

> Under s. 3(1)(i) of the Act, a bankruptcy notice is to issue only on a final judgment or final order and execution thereon not having been stayed. … I am of the view that, for the purpose of bankruptcy proceedings …, the default judgment at the time of the issue of the bankruptcy notice, which in this case was on 18 March 1994, is not a final judgment. This is so because, the judgment being a default one owing to the absence of the debtor at the hearing of the suit by the judgment creditor against him is not a judgment on the merit. *Any judgment given not on merit is liable to be set aside on an application made. If that be so, the default judgment when entered did not finally dispose of the rights of the parties.* In this case O. 29 of the SCR allows the debtor to do so within the period of 30 days. If he does not do so, then and only then, the said default judgment would crystallize into a final judgment. If this happens, after the expiration of these 30 days, the judgment creditor is entitled to request for a bankruptcy notice to be issued. However, in this case, the debtor within time had filed his application to have the said default judgment set aside. On 7 June 1994, the learned magistrate heard the debtor's application to set aside the default judgment and the application was dismissed. If this matter rested there, then the original default judgment became a final judgment. But it did not, for on 9 June 1994 the debtor exercised his right provided by law by filing an appeal with the High Court against the decision of the learned magistrate disallowing his application. So by the act of the debtor challenging the default judgment made against him, at that stage the judgment did not become final as yet. So the issue of a bankruptcy notice pursuant to that judgment would not as yet have arisen. In my view, the said judgment will only be a final one after the debtor has exhausted his remedy given by law. I find support in the dicta of Lord Esher MR in *Re Riddel ex p Earl of Strathmore* [1888] 20 QBD 512 where at p 516 he said:
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> > … in my opinion, 'a final judgment' means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined, in favour either of the plaintiff or of the defendant. I think that definition will be found to cover most cases, though perhaps not every one.
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> > … In my opinion the question is, not only was the claim determined, but was it finally determined? It can only have been finally determined if between the two parties to the action it cannot be raised again.

A The operative words in the dicta are 'finally determined'. For so long as the debtor has not fully exhausted his remedy, the fate of the default judgment is not finally determined" (emphasis added)

[6] Ms Jamie Tai (Ms Tai), counsel for the bank submitted that the facts in *Re Udos* case are different to the present case on two grounds:

1. The judgment in the present case was not a default judgment. It was an *ex parte* summary judgment which was later fully argued before the deputy registrar and the judge in chambers on appeal who held that summary judgment ought to have been granted.

2. The petitioner in the cited case filed the bankruptcy notice before the application to set aside the default judgment was heard, which application was filed within the required 30 days period. In the present case the BN was filed after the hearing before the deputy registrar and the judge in chambers, hence the merits of the case were considered.

[7] Hence she submitted that *Re Udos* case should not be followed. She also referred to me to two other cases, namely, *Re Tan Ah Poi, ex Multi-Purpose Finance Bhd* [1999] 2 CLJ 694 and *Re Sashidaran Kv Nair, Ex P Alliance Bank Malaysia Bhd* [2006] 4 CLJ 348 which did not follow the case of *Re Udos.*

Consideration Of *Re Udos* And Other Related Cases

[8] Before I deal with the cases cited by Ms Tai, it is incumbent on me to look closely at the judgment of Abdul Kadir Sulaiman J in *Re Udos*. His Lordship appeared to place much emphasis on the fact that the judgment was a default judgment which was given "not on merits" and until the debtor has fully exhausted his legal right of appeal, that judgment cannot be regarded as a final one. With the greatest respect, that is where His Lordship erred. There was an application before the Magistrate on 7 June 1994 to set aside the default judgment which was heard and dismissed. In such an application, counsels from both sides were present where arguments were heard and it was incumbent on the debtor to show that there were merits in his defense.

[9] Hence the so called judgment cannot no longer be regarded a default judgment as default implies that one side was not present. After the dismissal of the application to set aside, in my view the default judgment should no longer be treated as a judgment which was not given on merits. The issue which His Lordship should have considered is whether or not the judgment given on its merits is a final judgment.

[10] Coming back to the present case, the *ex parte* judgment given in an application for summary judgment hence in my view became a judgment given on merits after the learned judge in chambers allowed the appeal against the deputy registrar's decision and ordered judgment to be entered against the debtor. It is based on such scenario that I will consider this appeal.

[11] I shall first look at the judgment of Abdul Malik Ishak J in the case of *Re Tan Ah Poi, ex Multi-Purpose Finance Bhd (supra)* where the facts are similar to the present case in that the judgment there was pending an appeal to the Court of Appeal. The salient similarity in the present case and that case is that both judgments were given on merits. The issue there like in the present case was whether or not the judgment, which was pending appeal, is a final judgment within the meaning of s. 3(1)(i) of the Bankruptcy Act 1967.

[12] His Lordship in usual thoroughness examined all the relevant cases and legal materials came to the following conclusion:

> Thus, in construing the words "final judgment" in s. 3(1)(i) of the Bankruptcy Act 1967, I must give effect to it notwithstanding the consequences that might flow from it. I must also bear in mind s. 6(4) of the Bankruptcy Act 1967 which enacts that:
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> When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure or compound for a judgment debt, the court may if it thinks fit stay or dismiss the petition on the ground that an appeal is pending from the judgment.
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> and if one were to interpret a judgment pending an appeal as not a final judgment then it would render nugatory this particular section. If the bankruptcy notice cannot be issued in the first place then it would be pointless to have in our midst s. 6(4) of the Bankruptcy Act 1967. It is only after the issuance of the bankruptcy notice that the court can act under s. 6(4) of the Bankruptcy Act 1967 by staying or dismissing the petition on the ground that an appeal is pending from the judgment.

A Applying vigorously the rule of interpretation as alluded to earlier, the expression "final judgment" in s. 3(1)(i) of the Bankruptcy Act 1967 does not mean a judgment which is not open to an appeal. It simply means a judgment which is appealable. To interpret otherwise would fly in the face of logic and commonsense. It is also just, reasonable and sensible to interpret B it in this way (*Holmes v. Bradfield R.D.C.* [1949] 2 KB 1, 7). In my judgment, if a "judgment" pending an appeal is to be construed not as a "final judgment", then the ultimate consequence would be that only after the Court of Appeal's decision or after the Federal Court's decision would the judgment C be final. This is certainly not the intention of the legislature in enacting s. 3(1)(i) of the Bankruptcy Act 1967. To interpret otherwise than what had been suggested by me would bring about dire consequences. The floodgates would open unabated and the judgment debtors throughout the country will have a field day. All the judgment debtors need do to avoid issuance of bankruptcy D notices and, consequently, to avoid execution of the judgments through bankruptcy proceedings would be by filing notices of appeals. This should be avoided at all costs. Catherine Tay Swee Kian in her book entitled *"Bankruptcy The Law and Practice"* at p. 1 itemized the objects of bankruptcy in these words:

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(a) to secure a just and equitable distribution of the debtor's available property among his creditors.

(b) to relieve the debtor from his debts and to enable him to make a fresh start as soon as he is discharged by the court.

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(c) to investigate into the reasons for the debtor's insolvency so that the interests of the creditors and the public are protected.

In my judgment, it would be premature at this juncture to set G aside the bankruptcy notice.

[13] Another case which is of relevance is *Re Lo Kon Wah; Ex P Jupiter Securities Sdn Bhd* [2000] 5 MLJ 180 where Mohd Ghazali J (as he then was) had the same facts and issues as this case. This is what he said after he dealt with the rationale in *Re Udos*: H

With respect to counsel for the judgment debtor in the instant case, I cannot see how a judgment in default can be equated with summary judgment. The summary judgment entered against the judgment debtor is clearly a final judgment and hence falls within I the contemplation of s. 3(1)(i) of the Act. The SAR's decision has disposed of the matter. The judgment was obtained after the

SAR heard arguments from both sides based upon affidavit evidence. The SAR was obviously of the view that there are no triable issues and hence had allowed the judgment creditor to enter summary judgment against the judgment debtor. The O. 14 judgment is final and an appeal to the judge in chambers from the decision would be as of right. No leave is required. In *Central Securities (Holdings) Bhd v. Haron bin Mohamed Zaid* [1980] 1 MLJ 304, the Federal Court reiterated that an order giving leave to sign a final judgment is a final and not an interlocutory order.

Under the circumstances, I cannot find any basis in the argument forwarded by counsel for the judgment debtor that the summary judgment entered against the latter is not a final judgment or a final order.

[14] In my view the rationale expressed by the two learned judges in their judgments cannot be faulted and as such I adopt their views.

[15] The last case which I will refer to is the recent case of and *Re Sashidaran KV Nair, Ex P Alliance Bank Malaysia Bhd* [2006] 4 CLJ 348 *(Re Saahidaran)* where Low Hop Bing J (as he then was) listed numerous illustrations of final judgment which left with no doubt in my mind that the judgment in the present case is a final judgment. Most of the illustrations given concerned "default judgments" and if the courts had treated them as final judgments, what more can be said of judgments given after full blown arguments by counsels.

[16] Accordingly and based on the above authorities, the answer to the above issue for determination is in the affirmative.

[17] On the foregoing grounds, I hold that the learned SAR has not erred in arriving at the aforesaid decision. I therefore dismiss this appeal with costs to be taxed unless agreed to the bank.